



Science Arena Publications
Specialty Journal of Politics and Law

ISSN: 2520-3282

Available online at www.sciarena.com

2019, Vol, 4 (4): 73-81

Access to Commodity Market in the Laws of Iran and Developed Countries

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Abstract: *“Access to market” is amongst the essential concepts and goals pursued by the world trade organization within the framework of its agreements. This principle has been designed so that it can contribute to the countries in enhancing their economic development through expansion of businesses. Omission of tariffs and other business barriers has been accepted within the format of the inter-member negotiations as a solution to the expansion of the businesses. Access to the market as intended by the world trade organization is actualized for the case of the goods through border interventions like tariffs, volume restrictions and the other non-tariff measures. Within the framework of the world trade organization, access to the market points to the collection of the interventions and conditions imposed by the governments for the importing of certain goods and products in a nondiscriminatory manner. The subject of access to the market is closely interlaced with the tariffs. According to the prohibition of using the volume restrictions as well as the necessity for supporting the domestic industries through tariffs within the framework of the world trade organization, tariff is recognized as the most important instrument of business policy available to the governments and the most important means of limiting or expanding the accesses to the market. The present study aimed at a comparative study of the laws of Iran and developed countries in terms of access to commodity market based on a descriptive-analytical method. It has been concluded that there are hindrances in Iran’s regulations for access to the commodity market in respect to the developed countries that some of them can be removed and some others cannot be overcome and should be coped with.*

Keywords: *Business law, Developed countries, Access to the market, World trade organization.*

INTRODUCTION

Statement of the Problem

The countries’ mutual dependency on one another can take different forms with the most important of them being goods trading, services` trading, investment and workforce. It is through the goods` trading that the countries supply their needs for raw materials, machinery, equipment, spare parts and other consumable and non-consumable goods.

“Access to market” is one of the essential concepts and goals that has been and is being pursued by the World Trade Organization (WTO) within the framework of the world trade system based on agreements. This principle has been designed so that the countries are assisted thereby to enhance their economic development via expansion of business. Elimination of tariffs and the other impediments to the business has been accepted in the course of inter-member negotiations as a solution to the expansion of businesses. Access to the market as intended by WTO can be actualized regarding the goods via such border activities as tariffs, volume limitations and the other non-tariff measures. Within the framework of WTO, access to market refers to the set of interventions and conditions made and imposed by the government for nondiscriminatory importing of

certain goods. The subject of market access is closely interwoven with tariffs. Considering the prohibition of using volume restrictions as well as the necessity of supporting the domestic industries through tariffs within the framework of WTO, tariff is envisioned as the most important instrument of trading policy available to the governments and the most important means of limiting or expanding access to the market. In fact, access to the market is one of the essential concepts and goals pursued based on general agreements on tariff and trade (GATT) as well as within the today's more institutionalized framework of business, i.e. WTO. The world trade system's framework has been designed so as to assist the countries in their elevation of their economic development through expansion of businesses. Removal of tariffs and the other business barriers have been accepted within the inter-member negotiations as the solution to the expansion of business.

Access to the market as the concept intended by WTO can be organized for the different kinds of goods through such border interventions as tariffs and volume restrictions. The multilateral business negotiations aim at liberating the nontariff interventions and rendering market access more predictable. As for the goods, the GATT's necessary condition has been that the tariffs should have two features of predictability and stability [in rate].

The position of the developing countries has undergone many fluctuations since the endorsement of GATT agreement in 1947. At first, GATT was developed more in favor of the developed and affluent countries and the developing countries were not so much interested in joining it. During 1960s, a mindset appeared amongst the developing countries that led to the formation of a conference known as "UN's conference for development and business" (UNCTAD) causing changes in GATT's principles, including the one that the group of the developing countries was provided with a series of exceptions enabling them to operate in a level equal to that of the developed countries as well as their being imposed with no restriction in case they want to support their newly emerging industries and also their being provided with discounts and exemptions from customs' concessions in case they are inflicted with shortages in supply and payments' balance sheet. In order to gain access to the commodity market, the countries should join WTO and, for the time being, the world's economy has joined WTO. Today, WTO is enumerated amongst the pillars of globalization, particularly in the area of economy. So, various countries try developing this international organization and enhancing its position for accelerating the globalization process and making use of its interests. On the other hand, the countries that have not joined this organization, as well, try to join it and make use of the privileges of membership in this international institution thereby to attain economic and industrial development.

Strategies for gaining access to commodity market:

1) Export

- A) Direct export
- B) Indirect export

2) Participation

- A) Granting of concession
- B) Production contract method
- C) Management contract

3) Direct investment

Export is the easiest and least costly method for accessing the commodity markets. The selling of the manufactured goods to the foreign markets does not create so much change in the production lines and other resources. Export can happen directly or indirectly.

Many of the large companies enter the international markets though this method. Participation with the foreign companies takes place in various forms.

The countries' type of legal regulations specifies the method for accessing the goods' market. Comparative study of Iran's and developing countries' legal regulations in terms of access to commodity market is the primary goal of this dissertation.

Introducing World Trade Organization (WTO):

WTO is the most important and most effective international organization in the area of the international business that deals with the arrangement and supervision of countries' business relations. At present, 153 countries have joined this organization (Iran is not a member thereof) and they account for more than 95% of the entire global trade (export and import), in total.

After WWII, in 1946, large and war-engaged countries were looking for a solution to get over their bad economic situations. The aforesaid countries established international monetary fund and World Bank in their first undertaking. But, these two organizations could not respond to the hasty growth of global production and business. Due to the same reason, a conference was held in Havana in 1948 in the course of which Havana Charter was codified. In this charter, the establishment of an institution under the title of international trade organization (ITO) was forecasted for organizing the international business; however, Havana negotiations were fruitless in regard of the organization's formation and it only led to the enactment of a 34-article contract under the title of the general agreement on tariffs and trade (GATT) with the endorsement of 23 mostly industrial countries and it was on the eighth day of GATT negotiations as the longest and the most primary round of GATT negotiations (Uruguay Round, 1986-1994) with the participation of 123 member states that the formation of world trade organization was approved and finally WTO took the place of GATT in 1995. (Aram, 1999)

The Role of WO in Managing Tariff Barriers:

A glance at history notifies of the governments' abilities in changing the tariffs based on the country's status. As an example, USA's tariffs were very high in their rates during the years from 1816 to the end of WWII in such a way that it can be stated that US's industries were extremely supported by the government but it was with the business liberalization that the tariff rates started a descending trend. Although every government gains interests via setting high tariffs, it is an instrument usable by the other governments. Therefore, after WWII, the governments figured out the benefits of the free trade and sought solutions to become jointly committed to the reduction of their tariffs thereby to prevent the goods' free import and export from being disrupted so that the various countries could achieve the interests of free trade.

It has to be remarked that WTO has not set identical tariffs for all of the countries rather such a barrier is still existent on the access way of the countries, especially developing ones, and they have been allowed to support their domestic industries via setting tariffs; however, the use of tariff barriers and its amount has been regularized.

Knowing that the solutions to the maximization of welfare in the developed countries would not be followed by similar results in the developing countries, World Trade Organization (WTO) has taken measures in line with defining a different and specific behavior for them. Based on the principle of specific behavior, the developing countries have their own specific rights and laws and the developed countries should treat the developing countries more appropriately than the other WTO members. Setting of tariff on the foreign goods and products is one of the examples of this principle. WTO has set the medium range of the tariff in the developing countries between 25% and 40%, whereas the medium tariff for the developed countries should be in a range from 0% to 14%. Furthermore, the developing countries can set higher rates of tariff on some of the goods imported from them as agreed in negotiations with the members of WTO thereby to support their vulnerable industries. Of course, this is related to the countries' political relations, as well; therefore, a full-scale approach should be adopted for joining WTO. (Irvani, 2002)

One of the advantages in joining WTO pertains to the diversity of the foreign markets and export to them enables the countries to set higher tariffs for supporting their industries but it has to be noted that the amount of the set tariffs during the time should not be so much undulating so that the importers and

exporters are confused. For example, mobile phone importing tariff in Iran was fluctuating for a long time in such a way that the government abruptly increased the telephone importing tariffs without paying attention to the domestic potentials for producing high quality mobile phone sets in proportion to the people's preferences. This issue spontaneously caused a reduction in the people's welfare, on the one hand, and increased the smuggling of the mobile phones, on the other. (Bid Abad and Tabari, 2005)

Optimum Use of Tariff Barriers:

It seems that setting tariff is useful for supporting the newly emerging industries provided that the government has sufficient information about its domestic industries so as to be able to select the proper industries for sponsoring, adopt logical policies for developing competitive business entities and offer direct foreign investment incentives and, more importantly, make use of the tariff barriers as a temporary means.

It has to be reminded that the setting of tariffs leads to the growth and expansion of an industry when the country's relative advantages are taken into account in the supported industry. Therefore, when some of the country's industries are still in need of the government's aid and setting of the high tariff rates on the similar foreign products even with their long history of working in their field, it can be discerned that precise and real evaluations have not been carried out on the technical and managerial abilities in selecting these industries and the preservation and survival of such an industry might be even not in favor of the country's relative advantage.

In addition, the country's approach in setting tariff should be export-oriented. Due to the same reason, the government should specify a time table for the supported industries to show that the use of tariff is not permanent and these industries should look for foreign markets because the industries may lose their motivations for competition following the setting of tariff and become inclined towards the domestic market that is now not seriously rivaled. In this case, not only the government has not got involved in the market process but it has also caused the diversion of the resources. In other words, the government should take temporariness as a principle and, meanwhile respecting the evident principles of economy, avoid making useless costs.

Some of the developing countries ignored the global business for a period of time and became inclined towards self-sufficiency policy. For instance, China adopted such a very extreme approach and launched a large movement by the means of which, it became in possession of limited foreign technology and a laggard country with high production costs and low foreign investment. But, during the late 1980s, the majority of these countries announced the inefficiency of their policies. This way, they demanded the presence of multinational companies and began liberating their trades because their experiences proved to them that the global business is a win-win game. Therefore, we should also gain benefits from the free flow of the capitals and engage in the strengthening of the industries wherein we have relative advantages meanwhile avoiding the adoption of such broken policies. (Bid Abad and Tabari, 2005)

One of the positive steps in regard of reducing the non-tariff barriers and facilitating the membership in WTO can be realized as the enactment of article 103 of the fifth development plan: "The establishment of the non-tariff and non-technical barriers to import is prohibited during the foresaid plan's years of implementation except for the cases that the observance of canonical regulations makes it expedient. In case of the existence of such barriers, the government is obliged to enact equivalent tariff rates for removing them". This article is aligned with the rulings of article 11 of GATT that prohibits the use of limitations other than customs' tariffs and taxes for the members. This way, the member countries gradually take measures in line with reducing the tariff levels in proportion to the economic conditions after turning the non-tariff barriers to tariff barriers. According to article 103 of the fifth development plan, the government is obliged to limit the non-tariff barriers and turn them into tariff-barriers. In this case, government would be capable of supporting the domestic vulnerable industries via taking the aforesaid conditions into consideration meanwhile gradually reducing or eliminating the tariffs.

It appears that Iran should reconsider some of the current tariffs like the tariff on the automobile import for joining WTO. Of course, it does not mean that the importing tariffs should be zeroed rather they can be rationally decreased and stabilized so that they do not exceed WTO's tariffs, as well. Additionally, Iran can work in the course of its negotiations with the member states to win their agreements about the setting of discriminatory tariff rates on some of the commodities. This way, besides preserving and enhancing the consumers' welfare, the competition between the industries is increased and the efficient allocation of the resources can be witnessed meanwhile barring the government from intervention.

Non-Tariff Barriers on Market Access:

Although tariff is the most important type of business restriction, there are many of the other trading hindrances like importing apportionment, voluntary constraints on the export and antidumping interventions, as well. These barriers are called "non-tariff trade barriers (NTBs)".

Non-tariff trade barriers (NTBs) point to the set of works and operations rendering countries' business actions more difficult. The use of these various mechanisms for limiting the volume of the imports instead of tariff mechanisms is known as the non-tariff barriers in the commercial regime of the countries. These barriers feature lower transparency in comparison to the tariffs and have such effects as rendering commercial mechanisms to be inefficient and disrupting of the business ties between the countries.

The economic theories and applied experiences signify that the free market and business liberalization-elimination of the tariff and nontariff barriers of the business- are justified ways for achieving production and development. Countries with free market have more wealth and healthier population, higher levels of education and literacy, higher labor wage and better bioenvironmental standards and more appropriate investment opportunities. Conversely, the business barriers might be profitable in the short run but they will cause the country be inflicted with a very bad situation in terms of the lost wealth and slower pace of development hence fewer resources would be available for overcoming the society's essential problems. In business contracts, the parties reach agreements for the granting of tariff discounts regarding the negotiated items and elimination or mitigation of the nontariff barriers and pseudo-tariffs and many of the other cases. In the past decades, the endorsement of such contracts has been common amongst the third world countries. Iran has never seriously stepped into such arenas.

Nontariff barriers exert a large deal of effect on business space. Based on the business liberalization principle and according to article 11 of GATT, 1994, none of the members of the general agreement on tariffs and trade (GATT) has the right to impose limitations other than the customs' tariffs and taxes on goods' import and export. These constraints include all of the limitations, such as the apportionment of the imports and exports and requiring the acquisition of permit and the foreign currency policies and so forth. The business liberalization principle tries gradual elimination of the nontariff barriers and conversion of them into tariffs, stabilizing of the tariff roof and becoming committed to gradually lower the tariff level so as to eventually reduce and eliminate these barriers.

On the contrary, the nontariff barriers are considered to include two sets of "quantitative limitations" (like apportionments that are called "quotas") and the other nontariff barriers.

Undoubtedly, the thing that takes a place under the "other nontariff barriers" constitutes the widest and most diverse segment of the nontariff barriers and incorporates such barriers as "non-transparency of the business regulations", "unequal (unjust) and taste-based and unprincipled enforcement of the business regulations", "customs' formalities", "technical barriers of business" and "governmental purchase procedures".

Before entering this organization, the countries should remove their existing limitations in access to their markets for the foreign suppliers of the stock exchange services or they should be able to be exempted from the obligations of this principle via offering persuasive proofs in each of the service-providing methods. (Sajedi, 2005)

Examples of such an exception can be seen in commitments' table of the countries that have recently joined WTO.

This is confirmatory of the possibility of inserting such an exception in the countries' table of obligations in the status quo of WTO.

It is worth mentioning that the limitations that are the prerequisites of enforcement of governance do not contradict the principle of market access; for instance, acquiring of permit from a qualified institution for operating in a capital market is not in conflict with the principle because these limitations are amongst the most distinct manifestations of a country's enforcement of governance.

It has to be also stated that if a country succeeds in the negotiations to also constrain this principle, the exertion of the limitations and restrictions would be completely permissible.

Methods of Eliminating the Market Access Limitations:

Essentially, customs' tariffs can be eliminated in two ways: one of them is that the participating countries form customs' unions and agree on a customs' tariff and, then, gradually make it zero amongst the member states. (Feldern, 2005) This gradual decrease enables the manufacturers of the union's member states to adapt themselves to the loss resulting from the supportive tariffs. In a free trade zone, each of the member states sets its own foreign tariff; so, only the manufactured goods of a member state can be delivered from a member state to another without paying the customs' rights on the condition that the source certificate is annexed to the goods.

European communities have been created in the form of customs' unions. The free trade zone pattern has been preferred by all of the countries that want to remain free in determining their foreign tariff rates for various political reasons (impartiality policy, preservation of the preferred tariffs between the commonwealth nations). This goal led to the creation of "Europe's free trade union" in 1960 and endorsement of free trade agreements between the European communities, respectively, with Austria, Sweden and Switzerland in 1972. In doing so, the countries creating customs' union or free trade zone want to create a free and fair competition between all the residents of their countries.

Elimination of tariffs does not alone suffice the actualization of this goal. Due to the same reason, there are regulations set in the treaties related to the establishment of European communities as well as the "Europe's free trade union" against the limiting interventions, misuse of superior position, latent business barriers, governmental subsidies and monopolies. The free circulation of goods, services, capitals and establishment right (the fourfold freedom of the Europe's economic community) have been positively sublimed in the Europe's economic community. (Feldern, 2005)

Europe's economic region connected the Europe's economic community and Europe's free trade union in 1992. The regulations of the Europe's economic community regarding the fourfold freedom that had been stipulated without the participation of the member states to the Europe's free trade union were generalized to the Europe's economic region.

The role of the European communities should not be overstated. Indeed, there have always been hopes and doubts regarding the European communities' establishment and their ability of gradually paving the European Unions' way. However, progress towards the Europe's political unity and creation of a single monetary unit in Europe in line with achieving currency and economic solidarity caused an increase in the European parliament's authorities. In addition, the Western Europe Union became the defensive arm of the European Community.

The relative position of the European communities became a pattern and paradigm for similar plans. The Andean Common Market, Central America's Common Market and the West Africa's Common market came to existence but they could not keep pace with the competition in Europe. The goods produced in the state members of these common markets are extremely similar to one another. The East Africa's Common Market could not stand due to the political disputes between its stakeholders and it is not dissolved. Additionally, it is very early to rule the success of the North American Free Trade Zone (consisted of the US, Canada and Mexico). (Feldern, 2005)

Business liberalization has been stipulated in the articles of general agreement on tariffs and trade (GATT) through several mechanisms and in a step-by-step manner.

General Elimination of Quantity Restrictions:

Quantity restrictions that counteract trade liberalization constitute a policy adopted by the countries during the years after WWI for such a reason as economic crisis that was peaked in 1929. (Bagheri et al., p.13) Thus, the large countries, England included, became incumbently urged to limit trade liberalization and create supportive regimes such as apportionment for the import of the foreign goods and even prohibition of the unnecessary goods' import. Paragraph 1 of article 11 of GATT stipulated that "the members should not impose any limitations other than the rights and tolls, taxes or other costs on the imports by the other states or exports to them. Of course, exceptions have been set in the second paragraph of this same article, including the temporary measures for preventing or reducing the outcomes of such critical cases as shortage of foodstuff or other necessary products and/or execution of the standards or regulations pertinent to the classification or marketing of the goods in the international business. Therefore, as it is observed, the first step of trade liberalization has been taken through the removal of the nontariff barriers. Article 12 of the agricultural agreement, as well, points to the exceptions of the second paragraph in article 11 of GATT regarding the export prohibition and limitations and enacts regulations on the consequences of these prohibitions or restrictions in respect to the food security of the importing members.

The Status of Iran's Regulations and Rules in Terms of Alignment or Misalignment with the Principle of Market Access:

Islamic Republic of Iran's legal system has regulations that are not envisioned as being contradictory to the principle of market access. The most distinct examples of them are regulations that apparently imply the qualitative restrictions for operation in capital market. Using a little scrutiny in the contents of those regulations reveals the normality of such restrictions. The majority of these limitations fall into two general sets: the limitations that are the prerequisites of every country's exercising of supervision over activities in capital market and the limitations that are the prerequisites for the operation in this sector as well as their specific expediencies in this area that necessitate them. The forthcoming section deals with these regulations.

- 1) Article 28: Establishment of stock exchange markets, over-the-counter markets and financial institutions introduced in that law depends on their registration in the organization and their activities are subsequently supervised thereby. This article has suspended the establishment of the exchange markets, over-the-counter markets and financial institution subjects of this law on the registration in this organization and rules their being under the supervision thereof.
- 2) Similar to the law on the securities and stock exchange market, article 1 of the guidelines to the method of acquiring permits for the establishment of the stock exchange markets, centers and financial institutions from the stock exchange and securities organization, passed in 10/30/2006 by the board of the directors of stock exchange and securities organization, suspends the operation of the capital market institutions on the registration in the foresaid organization with the difference being that it rules the compulsoriness of both registration and permit acquisition and their being within the jurisdiction of the organization.
- 3) Article 9 of the instructions on the establishment and financial information processing activities, approved in 08/23/2010 by stock exchange and securities organization's board of directors, as well, has stipulated the necessity of the financial information processing companies' acquisition of certificate from the organization hence it does contain any new provisions in terms of the type of limitations. All three abovementioned restrictions originate from the unbreakable bond between the country's enforcement of governance and supervision by the qualified institutions over the activities in capital market.
- 4) Article 19 of the guidelines on granting of permit to and operation of the functionaries within the format of legal persons, enacted in 12/16/2004 by the stock exchange assembly, speaks of another type

of qualitative restrictions that, unlike the foresaid three, are not rooted in the enforcement of countries' governance rather imply a sort of necessity for acquiring skills in a formal and professional manner. This requirement is interlaced with the essence of activities in the capital market. Since the stock exchange is the ground of the governmental and private capitals more than any other place and the transactions by this sector, beside featuring a specific sensitivity, feature a large diversity and follow certain methods, the implementation of the majority of which is beyond the ordinary and, especially, traditional traders, it is evident that every country can oblige the activists of the capital markets to the acquisition of the required skills and ensure their expertise and abilities for administrating the transaction courses in this market through granting professional certificates by the qualified institutions of this field. The adjusted rules and regulations and the reduction of the uncommon barriers of the foreigners' access to the markets enable the winning of the foreigners' trusts for making foreign investments and booming of Iran's capital market. (Fathi, 2002)

The examples of these exceptions to the principle of market access can be very commonly seen in the countries' tables of commitments. In Saudi Arabia's table of commitments, the foreign service-providers need a confirmation by its investment authority as ruled in article 3/5 of its foreign investment law passed in 2000. (Tari, 2009)

According to this issue, it seems that the countries cannot withdraw from their enforcement of governance and supervision on the investment area, especially in regard of the foreigners, no matter how much they move towards trade liberalization. (Tari, 2009)

Regulations Contradicting the Principle of Market Access:

In the regulations related to the capital market's domain, there are approved rules and regulations in Iran that do not match with the requirements stemming from the principle of access to the market due to the uncommon qualitative and quantitative restrictions they have created in foreigners' access to the market. These regulations can be divided into two sets in regard of the idea that some of them can be changed and revised and some of them lack such an attribute due to the special expedencies of our legal system: regulations that are in opposition to the principle of market access but can be revised and corrected and the regulations that contradict the principle of market access and cannot be revised and corrected and should be consequently placed amongst the exceptions to the acceptance of the principle of market access upon Iran's joining of WTO.

Conclusion

The principle of market access that serves the reduction or elimination of any qualitative and quantitative restriction for the foreigners' free access to the international markets of service exchange is amongst the important maxims of service trading agreement that plays a primary role in trade liberalization for the world trade organization.

Undoubtedly, the formation of WTO should be realized as the most important legal incident in the area of the international business during the recent decade. The importance of the position and special function of this organization in the area of the global economy and business have drawn the attentions of the economists, jurists and politicians.

On the other hand, the worries and doubts of less developed and third world countries regarding membership in this organization and assertion of the notions by its proponents and opponents have added to the importance and sensitivity of this organization. Furthermore, acceptance of Islamic Republic of Iran's supervisory membership in this organization during the recent months caused this issue to be turned into one of the important economic, political and legal discussions of the country. According to the abundant effects that the membership in this important international institution has left in the economic, cultural, business,

political and other areas necessitates maximal familiarity with this organization parallel to the reduction of the contingent adverse effects stemming from joining this international institution.

Although the WTO's agreements underline the necessity of positive measures for paying attention to the special needs of the third world countries, it can be stated that its particular behavior would cause the paling of the effect of many of the different regulations in practice and even there would be no legal requirement for them when the foresaid given measures do not entail objective and certain interventions. As a specimen, the preferred behavior in favor of the developing countries via facilitating their access to the market would be possibly the most important action that the developed countries can take. However, there is no clear-cut article in WTO's agreement that can be used as a proof in the course of the legal trial.

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